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IN THE

Supreme Court of the United States

October Term, 1970.

No. [redacted]
291

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
St. Petersburg, Florida 33701

GARDNER W. BECKETT, JR.,
52 Sixth Street South,
St. Petersburg, Florida 33701
Attorneys for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

Petitioner, Donald R. McVean, respectfully prays that a writ of certiorari issue to review two judgments of the District Court of Appeal of Florida, Second District. The first judgment and sentence was entered on October 24, 1969, rehearing denied November 20, 1969, affirming the judgment and sentence entered on December 11, 1968 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced him to imprisonment for a term of from six months to five years for the crime of possession of marijuana. The second judgment was entered on December 31, 1969, per curiam, rehearing denied February 5, 1970, affirming the judgment and sentence entered on May 23, 1969 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas

County, which sentenced him to imprisonment for a term of from six months to five years for the crime of selling marijuana, said sentence to run consecutively to the prior sentence imposed.

A petition for writ of certiorari in the first case of possesssion was dismissed by the Supreme Court of Florida on January 30, 1970, for alleged procedural error, rehearing denied February 24, 1970. A petition for writ of certiorari in the second case of selling was dismissed by the Supreme Court of Florida for lack of jurisdiction on April 8, 1970. The petition in this second case was unaccompanied by the entire record, the same procedural error which occasioned the dismissal of the petition in the first case.

OPINIONS BELOW.

The opinion of the District Court of Appeal of Florida, Second District, in the first case of "possession" is reported at 227 So. 2d 535, and is set out in the Appendix, *infra*, p. 1, together with a copy of the order denying rehearing entered on the 20th day of November, 1969, Appendix, *infra*, p. 13. The order of the Supreme Court of Florida granting a motion to dismiss, Appendix, *infra*, p. 17, and the order denying the petition for rehearing dated the 24th day of February, 1970 are set out in the Appendix, *infra*, p. 19.

The per curiam opinion of the District Court of Appeal of Florida, Second District, in the second case of "selling" is reported at 230 So. 2d 507(2), and is set out in the Appendix, *infra*, p. 20, together with a copy of the order denying rehearing entered on the 5th day of February, 1970, Appendix, *infra*, p. 21. The order of the Supreme Court of Florida denying the Petition for Writ of Certiorari for lack of jurisdiction is set out in the Appendix, *infra*, p. 22.

JURISDICTION.

The earlier of the two judgments of the District Court of Appeal of Florida, Second District, was rendered and entered on October 24, 1969. Rehearing was denied on November 20, 1969. The petition for certiorari to the Supreme Court of Florida was dismissed January 30, 1970. Rehearing was denied February 24, 1970. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Whether the exclusion by law from Florida juries of persons between the ages of seventeen and twenty-one years of age violates the Fourteenth Amendment to the United States Constitution as to a defendant in this age group who is not protected by special juvenile court laws.

2. Whether a criminal conviction in a Florida court and its affirmance on appeal violates the due process clause of the Fourteenth Amendment where the defense of entrapment has been raised and the prosecution fails to offer any proof thereafter that the intent to commit the crime arose in the mind of the accused rather than in the mind of the police officer.

STATEMENT OF THE CASE.

Petitioner, Donald R. McVean, is hereinafter usually referred to as the defendant. On May 17, 1968 at about 6:30 P. M., Joe Wood, a close friend of the defendant for over a month, came to the defendant's mother's home where the defendant resided and was admitted by the defendant as he had been on numerous prior occasions. Shortly after he was admitted, two deputy sheriffs forced their way into the home with a search warrant and arrested the defendant and incarcerated him in the county jail. Later it was learned that his friend, Joe Wood, was actually Joseph Canali, a 24 year old police officer of the City of St. Petersburg.

Donald R. McVean was charged with possession of marijuana on April 14, 1968; two charges of selling hashish on April 19, 1968; possession of hashish on April 20, 1968; selling a hallucinogenic drug on May 13, 1968; possession of a hallucinogenic drug on May 17, 1968; possession of marijuana on May 17, 1968; selling a hallucinogenic drug on May 17, 1968, and the other case here sought to be reviewed, possession of marijuana on May 15, 1968. All nine of these direct informations were filed just prior to the arrest of May 17, 1968. All cases have been tried or were nol prossed except the two cases here sought to be reviewed and those cases dealing with the hallucinogenic drugs which were nol prossed and refiled in the Federal Court and are presently pending. (*United States of America v. Donald R. McVean*, No. 69-176-Cr.T in the United States District Court for the Middle District of Florida, Tampa Division).

Prior to the trial of the cases here for review and after the panel of prospective jurors had been qualified a "CHALLENGE TO THE PANEL" was duly filed with the trial judge insisting that under the Fourteenth Amendment to the Constitution of the United States every citizen was entitled to

to trial by a jury from which citizens of the defendant's class had not been excluded by the laws of that State. The Challenge to Panel is set out in the Appendix, *infra*, p. 23. The Challenge was denied in both cases.

At the conclusion of the state's case in both cases here sought to be reviewed the defendant requested a directed verdict on the grounds that the defense of entrapment had been raised by the defendant and that it then became incumbent upon the state to prove that the intent to commit a crime arose in the mind of the defendant and not in the mind of the police officer.

Not only did the state fail to produce any evidence to refute the entrapment defense and thereby overcome the presumption of innocence of the defendant* but the trial judge refused to give the written requested charge on entrapment to the jury. (T p. 10) Appendix, *infra*, p. 25.

* "T" refers to the Original Transcript.

REASONS FOR GRANTING THE WRIT.

I.

THE EXCLUSION BY LAW FROM JURIES OF PERSONS IN A CERTAIN AGE CATEGORY, NOT OTHERWISE PROTECTED BY SPECIAL JUVENILE COURTS, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

> "No free man shall be arrested or detained in prison, or deprived of his freehold, or outlawed or banished, or in any way molested; and we will not set forth against him, *unless by the lawful judgment of his peers and by the law of the land.*" (Emphasis supplied.)

Thus, the MAGNA CARTA, generally regarded as the chief bulwark and defense of men of English speech everywhere since the year 1215, demanded of government a "jury of his peers" for any accused.[1]

"Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." Thus this court has heretofore acknowledged that minors are entitled to *some* adults' due process in the case of *In Re Gault* (1967) 387 U. S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 and *Re Winship*, — U. S. —, 25 L. Ed. 2d 368, 90 S. Ct. —.

The Florida Constitution, Article V, Section 12, establishes special Juvenile Courts in Florida wherein the ages of the youthful offenders subject to its jurisdiction are to be set by the legislature of that state. The legislature has enacted Florida Statutes Chapter 39.01 specifying that all juveniles to age seventeen (17) are subject to the jurisdiction of the juvenile court established by the State Constitution. Section 39.02(5) of said Statute provides that if the

1. Comptoms Picture Encyclopedia Vol. 9, 1953 Edition, "MAGNA CARTA".

juvenile court obtains jurisdiction of a child under seventeen years of age ". . . the court shall retain jurisdiction, unless relinquished by order, until the child reaches twenty-one years of age. . . ." Thus a juvenile who is accused of violating the law of the state of Florida prior to his seventeenth birthday has the protection of the Juvenile Court until his twenty-first birthday. On the other hand if a juvenile's first brush with the law occurs after his seventeenth birthday he is treated as an adult without the protection of the Juvenile Court. At the same time a juvenile so situated is denied the right enjoyed by adults to be tried by a jury of his peers, that is; drawn from a jury list from which persons of his own age group, ages 17 through 20, have not, by law, been excluded.

Article XIV of the Amendments to the Constitution of the United States provides in Section One (1) thereof that

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 40 of the Statutes of the State of Florida provide the minimum age for jurors as twenty-one years. The Federal Courts have repeatedly held that

> ". . . an intentional, planned, and deliberate exclusion of or discrimination against members of a particular political or economic group, religious faith, race, ancestry, or sex, by officers in charge of the selection and summoning of jurors, is in contravention of

the right to jury trial and of the 'due process' and 'equal protection' clauses of the Fourteenth Amendment, at least as against an accused on trial or a litigant belonging to the class or race discriminated against. . . ."[2]

Juveniles up through age seventeen have a special court, adults have courts, but those persons between seventeen and twenty-one years are, by the laws of the State of Florida, deprived of jurors their own age. This deprivation should not be permitted to stand against the Fourteenth Amendment.

II.

The Refusal of a Trial Judge to Give a Requested Jury Instruction on Entrapment, Where This Defense Is Raised by an Accused, and the Refusal to Place the Burden on the State to Prove That Entrapment Did Not Occur Is a Clear Violation of the Presumption of Innocence Guarantee of the Fifth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and This Fundamental Law Should Be Made Fully Applicable to the States by This Court.

As late as May of 1963 this Court expressed the view that

". . . The defense of entrapment, its meaning, purpose and application, are problems that have sharply divided this Court on past occasions . . . whether in the absence of a conclusive showing the defense is for the court or the jury, and whether the controlling standard looks only to the conduct of the government, or also takes into account the predisposi-

2. 31 Am Jur—"Jury" Section 93 and cases therein cited.

tion of the defendant, are among the issues that have been mooted."

Lopez v. United States, 373 U. S. 427, 10 L. Ed. 462, 83 S. Ct. 1381, reh. den. 375 U. S. 870, 11 L. Ed. 2d 99, 84 S. Ct. 26 (decided on other grounds).

Thus it is that this Court has acknowledged the conflict existing between federal courts and state courts as respects the applicable law of entrapment and the Constitution.

The first pronouncement of this Court as to the applicability of the defense of entrapment to a plea of not guilty occurred in the 1932 case of *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413, 53 S. Ct. 210, 86 ALR 249 in which the majority opinion held the defense to be a matter for the jury in cases of violation of federal acts.

This Court in *Sherman v. United States*, 356 U. S. 369, 2 L. Ed. 848, 78 S. Ct. 819, while not directly deciding the point, stated that

> ". . . where the issue (entrapment) has been presented to them, the Courts of Appeal, since *Sorrells*, have unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused. . . ."

See also *Henderson v. United States*, 237 F. 2d 169, 61 ALR 2d 666 (CA 5, Fla.).

Thus some of the federal courts have recognized the guarantees of presumption of innocence, due process and equal protection to those charged with violations of federal laws without providing the same guarantees to those accused of violations of state laws. Others have refused to protect these constitutional guarantees. See Annotation in

61 ALR 2d 677. In *Martinez v. United States*, 373 F. 2d 810 (CA 10, NM) the tenth circuit court stated the following:

> "The defense of entrapment was unknown to the common law. Although it is now firmly entrenched in federal jurisprudence it is still not recognized in some state jurisdictions. . . . . *The fact that an accused asserts the affirmative defense of entrapment does not shift the burden of proof to him.* When the defense is raised or asserted, the burden is upon the government to prove beyond a reasonable doubt that entrapment did not occur. . . . If the evidence in the case on the issue is conflicting, the issue of entrapment should be submitted to the jury. . . . ". (Emphasis supplied.)

Florida recognized the defense of entrapment both in the federal court, *Henderson v. United States*, *supra*, and in the case of *Dupuy v. State*, 141 So. 2d 825 (3 DCA, Fla., 1962) wherein the law is stated as follows:

> "Where the defense of entrapment is raised the state must make a showing amounting to more than mere surmise and speculation that the intent to commit the crime originated in the mind of the accused and not in the minds of the officers."

The defense of entrapment in federal courts is, according to *Sorrells v. United States*, *supra*, firmly guaranteed to an accused who asserts it. The defense is supposed to be guaranteed to an accused in those states that recognize the defense. The defense should be made fully applicable to all persons accused of violation of the laws of the federal government or the state governments.

The facts of the instant case and the applicable law, conclusively show that the defendant, if not every citizen of the United States, is entitled to a jury instruction on entrapment where the defense has been raised.

CONCLUSION.

In view of the considerations set forth above, we respectfully submit that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
St. Petersburg, Florida 33701,
GARDNER W. BECKETT, JR.,
52 Sixth Street South,
St. Petersburg, Florida 33701,
Attorneys for Petitioner.

May, 1970

APPENDIX.

Opinion of the District Court of Appeal of Florida, Second District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JULY TERM, A. D. 1969
CASE NO. 68-625

DONALD R. McVEAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed October 24, 1969.

Appeal from the Circuit Court for Pinellas County; B. J. Driver, Judge.

Lemuel S. Hunnicutt, St. Petersburg, for Appellant.

Earl Faircloth, Attorney General, Tallahassee, and Michael N. Kavouklis, Assistant Attorney General, Lakeland, for Appellee.

LILES, *Acting Chief Judge.*

Appellant, defendant below, was informed against and charged with violation of the narcotics law in that he was

alleged to have unlawfully possessed or to have had in his control a certain narcotic drug, to-wit: Cannabis Sativa, commonly known as marijuana. He was tried by jury, convicted, adjudicated guilty by the trial judge and sentenced to a term of six months to five years in the state prison.

From the record it appears that the State relied upon a witness named Joseph Canali who was an undercover officer employed by the City of St. Petersburg. He testified that his job was to ferret out and arrest the users and sellers of narcotics. He was dressed to resemble what is commonly known as a "hippie." In the course of his work he became acquainted with the defendant and several other youths of defendant's age. He came to know the defendant at the defendant's home and had been out with him and other youths on several occasions. On this specific occasion, to-wit: May 4, 1968, Officer Canali along with defendant, Donald McVean, together with two other youths went to a restaurant and then to a place called the Electric Zoo, which is a dance club for teenagers.

Upon arriving at the Electric Zoo, Canali and the other two youths went into the club and McVean left without saying where he was going but returned within ten or fifteen minutes and said to Canali, "Let's get out of here." At the suggestion of another of the youths, the group went to his parents' house. Once in the kitchen one of the youths put a small water pipe on the table and lined the bowl with tin foil. At this juncture, Officer Canali took from the box belonging to McVean a piece of the substance and placed it in a cigarette wrapper.

Officer Canali further testified that the group went into the living room and sat down in a circle. McVean then loaded the pipe with the substance from the box. After lighting it he passed it to one of the other youths who took a couple of drags and passed it on to another. It was passed from one person to the other with each one smoking

it until approximately 2:30 a.m. when all of the youths but Canali went to sleep. Canali then removed the tin foil from the pipe and placed the tin foil along with the ashes in a cigarette wrapper and placed them in his pocket. About 3:30 or 4:00 a.m. he woke everybody up and took defendant and two of the youths home.

The sample of the marijuana together with the tin foil and ashes were subsequently sent to Mr. Ward Hutson, an expert, who testified that the substance removed from the box by Canali was marijuana and that the resin contained in the tin foil was the result of marijuana smoking. Upon this evidence the jury found the defendant guilty.

Appellant has assigned nine points of error committed by the trial court. We have examined all of the points, studied the record and briefs submitted by both parties, and find it necessary only to discuss the question of entrapment.

Appellant argues that he requested an instruction on entrapment and the trial judge indicated he would give such a charge. However, the trial judge failed to give a charge on entrapment. The record reveals that at the conclusion of the judge's charge to the jury, the judge asked counsel for the defendant whether he had any argument to make and counsel responded that he did not. In any event, the record reveals that counsel made no objection whatsoever to the judge's failure to give an instruction on entrapment at the trial level and that his objection entered for the first time on appeal is untimely.

We do not believe the trial judge erred in his refusal to give an instruction on entrapment. A close and thorough study of the record reveals that Officer Canali did not ask the defendant on May 4 to purchase the marijuana. That he, in fact, did not know McVean had gone to purchase marijuana until he later advised Canali that he had purchased some "grass."

While it is true that Officer Canali was dressed as a "hippie" and became friends with McVean for the purpose of determining whether he, McVean, or any other youths possessed or were using marijuana, this in our opinion does not constitute entrapment as that defense requires that the intent to commit the crime be placed in the mind of the defendant by the officers. See *Pearson v. State*, Fla. App. 1969, 221 So. 2d 760.

As pointed out above, the other eight points urged by defendant are without merit. Appellant having failed to show error, the judgment is therefore affirmed.

PIERCE and MANN, *JJ.*, Concur.

Order Denying Rehearing.

IN THE

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT.

JULY TERM, A. D. 1969.

THURSDAY, NOVEMBER 20, 1969.

CASE NO. 68-625.

DONALD R. McVEAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Counsel for Appellant having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

Order of Supreme Court of State of Florida Granting Motion to Dismiss.

IN THE

SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1970.

FRIDAY, JANUARY 30, 1970.

CASE NO. 39,227.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Respondent's motion to dismiss is granted and it is ordered that the petition for writ of certiorari be and the same is hereby dismissed.

Order Denying Rehearing.

IN THE

SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1970.

TUESDAY, FEBRUARY 24, A. D. 1970.

CASE NO. 39,227.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On consideration of the Petition for Rehearing, filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

Per Curiam Opinion of District Court of Appeal of Florida, Second District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA.
SECOND DISTRICT.

JULY TERM, A. D. 1969.

CASE NO. 69-297.

DONALD R. McVEAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed December 31, 1969.

Appeal from the Circuit Court for Pinellas County; B. J. Driver, Judge.

Lemuel S. Hunnieutt, St. Petersburg, for Appellant.

Earl Faircloth, Attorney General, Tallahassee, and Michael N. Kavouklis, Assistant Attorney General, Lakeland, for Appellee.

PER CURIAM.

Affirmed.

HOBSON, *C. J.*, and LILES and MCNULTY, *JJ.*, CONCUR.

Order Denying Rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT.

JANUARY TERM, A. D. 1970.
THURSDAY, FEBRUARY 5, 1970.

CASE NO. 69-297.

DONALD R. McVEAN,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

Counsel for Appellant having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

Order of Supreme Court of Florida Dismissing Petition for Writ of Certiorari.

IN THE SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1970.

WEDNESDAY, APRIL 8, 1970.

CASE NO. 39,432.

DISTRICT COURT OF APPEAL, SECOND DISTRICT.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

Challenge to Panel.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY.

CIRCUIT CRIMINAL NO: ———.

STATE OF FLORIDA,

Plaintiff,

v.

DONALD R. McVEAN,

Defendant.

Comes now the defendant in the above styled cause, by and through his undersigned attorney, and challenges the panel of prospective jurors in the above styled cause, prior to examination of any individual juror, on the grounds that the prospective jurors were not selected or drawn according to law in the following particulars:

I

The defendant in this cause is eighteen years of age.

II

The Fourteenth Amendment to the Constitution of the United States guarantees to every citizen of the United States the right to trial by a jury from which no citizen has been arbitrary excluded because of race, sex, color or other exclusions which single out any class of persons for different treatment not based on some reasonable classification. Hoyt v. Florida, 368 U. S. 57, 82 S. Ct. 159.

III

The Court should take judicial knowledge of the fact that narcotics or hallucinogenic drug charges are most prevalent among persons under twenty-one (21) years of age.

IV

Not one prospective juror on the panel in this cause is less than twenty-one (21) years of age.

V

A citizen becomes an adult within the jurisdiction of this Court upon reaching his or her seventeenth (17) birthday and the juvenile court no longer has jurisdiction.

WHEREFORE, this defendant respectfully requests that a new jury list be compiled wherein included in said list of eligible jurors there be prospective jurors between the ages of 17 and 21 years in order to comply with the United States Constitution, Fourteenth Amendment and the Florida Constitution Declaration of Rights Section Eleven (11).

Respectfully submitted,

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
St. Petersburg, Florida,
Attorney for Defendant.

Requested Jury Instructions.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY.

CIRCUIT CRIMINAL NO. _____.

STATE OF FLORIDA,

Plaintiff,

v.

DONALD R. McVEAN,

Defendant.

Defendant requests that this Honorable Court give the following instruction to the jury in addition to standard instructions:

If you should find from the evidence that the State has proved beyond and to the exclusion of a reasonable doubt that the defendant is guilty of the offense charged, but you further find from the facts that the State has failed to prove to your satisfaction by more than mere surmise and speculation that the intent to commit the crime originated in the mind of the accused and not in the mind of the officer, then you must find the defendant not guilty by reason of entrapment.

Entrapment is when officers of the law or their agents induce, instigate or lure the accused into committing an offense which he had otherwise no intention of committing.

The practice of inducing or instigating the commission of a crime by an otherwise innocent person is denounced as reprehensible and contrary to sound public policy.

Dupuy v. State, 141 So. 2d 825.

Respectfully submitted,

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
St. Petersburg, Florida,
Attorney for Defendant.